Reform of the Judicial System of the Czech Republic and the Accession to the European Union

Europeum – European Policy Forum
Ivo Šlosarčík

1. Segments of Czech judiciary influenced by the accession to the European Union

The Treaty on the European Union (Art. 49) states that a state, which wants to (successfully) apply for the EU membership, must respect principles of freedom, democracy, respect for human rights and the rule of law. An analogous set of criteria for the current wave of candidate states was formulated in Copenhagen in 1993. None of the documents mentioned formulates detailed rules for the judicial reform in candidate states necessary for the accession to the EU.

However, Czech judiciary occupies a prominent position in the attention given by the European Commission and EU member states to the Czech republic in the process of its preparation for the EU enlargement. In the regular reports of the Commission, Czech judiciary is regularly among the areas of state activity which need "significant attention" or "continuous attention" which in the Commission's "newspeak" is a relatively strong critique of the current state of judiciary. In reaction to the critique, the Czech government has initiated a reform of the civil service and judiciary. While in the reform of the civil service an intensive development can be traced (i.e. the adoption of the new Civil Service Act and mandatory education of civil servants in the European integration), the results of the proposed reform in the judicial sector have been much more modest. Further, thorough structural changes in

the judiciary, contained by the new Judicial Act (adopted 2002), have been declared void by the Constitutional Court.

The Czech Republic has not asked for any transitional period or permanent exception from acquis communautaire in the judicial system. Hence, the judiciary in the Czech Republic shall be influenced by the membership in the European Union at three levels. The levels of the EU-Czech interaction in the area of judiciary are as follows:

- requirements of the membership in narrow, technical sense – the capacity of judiciary to communicate with the European Court of Justice and courts in other member states, the requirements based on judicial co-operation in the I. and III. pillars of the European union.
- general capacity of Czech judiciary to enforce the EC/EU law – i.e. knowledge of the EC/EU law among the judges, capacity to apply the EC/EU law in the particular dispute and ability to give priority to the EC law over the domestic legal system
- general quality of Czech judiciary as an element of the rule of law – quality and speediness of the courts in cases without the EC element, independence of judiciary and quality of the other staff of the courts.

2. Limits of the EC/EU inspiration for Czech judicial reform

The impact of the acquis communautaire on Czech judiciary will be significant but the reform itself can be inspired by the European integration in a limited scale only. The equivalent (or even more intensive) inspiration should be taken from the experience of (some) member states and documents of the Council of Europe.

The requirements of the acquis communautaire for a new member state are formulated in detail only in a limited number of issues. Predominantly, they are formulated by the catalogue of objectives – such as capacity to enforce the acquis and protect the interest of the involved parties (individuals and companies).

Acquis communautaire does not create a uniform system of the judicial power in the member states. The acquis self-restrains to the requirement to apply the EC/EU law and to filter the discrepancies between the EC/EU and national legal systems. In the process of creation of the European area of security, justice and law, another requirement of co-operation in civil and criminal matters is added. Other qualities of the member state's judiciary – such as the independence of judiciary and its general efficiency - are only the third rank priorities of the acquis communautaire.

Even some current member states are criticised for inefficiency of their judiciary – a (warning) example is Italy which loses tens of cases before the European court for human rights in Strasbourg (ECHR) per year. The ECHR finds Italy in violation of the right to fair trial, guaranteed by the European Convention on Human Rights, in particular for extensive delays in the judicial procedures. However, the complaints of the analogous problems in some member states are not the solution for the Czech Republic – the simple reason is that the Czech Republic, i.e. a candidate state, while e.g. Italy is already member of the EU club.

The fact that the Constitutional Court has abolished a significant part of the amended Judicial Act (zákon o soudech a soudcích) can cause a delay in the judicial reform. In contrast, it could serve as the initiator of a new reform, more tailored to the requirements of the EU membership. A kind of tension can be observed between the position of the Czech constitutional court, which focuses on the independence of Czech judiciary, and the critique by the EU institutions, which is targeted on the capacity of Czech courts to apply acquis. The judicial independence and judicial capacity are not directly interconnected – there can exist short-term tension between these two principles.

There is a risk that Czech companies and individuals will learn to apply the EC/EU law earlier and more effectively than Czech judiciary. The potential to do so has been already expressed in the increasing number of complaints before the European Court for Human Rights. Additionally, the information campaign on the EU will be significantly more intensive than the campaign (if any) on the ECHR. Therefore, the

first test for Czech judiciary may be linked to the European convention on Human Rights, rather than to the membership in the EU.

3. "Technical" impacts of the EU membership on the Czech judicial system

The fundamental change for a Czech judge caused by the European integration will be a chance – and sometimes an obligation – to communicate with his/her counterparts at the European level (European Court of Justice) and in other member states. The key instrument of the communication with the ECJ will be the preliminary question. The amendment of Czech procedural law will have to enable to refer the preliminary question to the ECJ and to enhance the use thereof. Further, the fact that even other institutions (like the appellate organ of the professional chambers) can pose preliminary questions should be taken into account.

The second area influenced by the "technical" changes in the judiciary is the judicial co-operation among member states in civil and criminal matters. The main issues will be the acquis of the civil co-operation in the I. pillar of the EU, criminal matters covered by the III. pillar and the co-operation within the Schengen system. General international agreements (i.e. Hague agreements on civil procedure, delivery of documents or evidence management) and so called tertiary community law (e.g. the Lugan convention) will have a subsidiary role.

The abovementioned inter-judicial co-operation will have the form of a "standard" implementation of the international law into Czech legal system. Hence, Czech judiciary should be familiar with it – majority of the conventions have already been signed by the Czech Republic, the residual part is to be adopted before the accession to the EU. The difference is the dynamics of the whole process. Czech judiciary shall be prepared to operate with a moving catalogue of norm. While in regards to the international treaties, the Czech republic has full control over its (non)participation in the international co-operation, the norms in the Ist pillar are to be adopted (after 2004) by qualified majority of the member states, i.e. even against the opposition of the Czech Republic.

4. General capacity of Czech judiciary to enforce the EC/EU law

A more general result of the enlargement will be the obligation to enforce the EC law. This will include the knowledge of the EC law among the judiciary, the capacity to apply it and, as the last resort, give priority to the EC norm over the Czech one.

The education of Czech judges in the EC/EU law will have the key role/position in the ability of the judiciary to apply the acquis communautaire. The universities shall remain the institution where Czech judges get core education in the EC/EU law. The EC law is the mandatory part of the obligatory curriculum in Czech universities, albeit there is still a relatively low linkage with the practice.

In the area of the continual education of judges, the central process shall continue even after Czech accession to the EU. Due to the incompatibility with the principle of the judicial independence, the Constitutional Court declared void the intended system of continual and concentrated education of judges, which should have been provided by the newly established Judicial Academy. Therefore, at present the central element of the education of judges are ad hoc training and the cascade system of judicial training (where the specially trained judges are intended to increase the quality of education of their colleagues).

The education of the judges in the EC/EU law has specific features in comparison to the education of judges in other areas of law. All judges have university education in other areas of law (like civil, commercial, criminal and administrative) and the university education still forms a basis for their adaptation to the changes of the Czech legal system in the last decade. This is not applicable to the area of the EC/EU law – older judges have not undergone any EC/EU law course during their university education. This absence further strengthens the need for continuous education during their careers. It is worth consideration whether the requirement of the knowledge of the EC/EU law should be given a temporal preference over the strict interpretation of the judicial independence. The solution can be found in a mandatory exam in the EC/EU law and more consistent application of the disciplinary sanctions against those judges who neglected their education in the EC/EU law.

Other impulses to the education of judges are activities of the EC/EU itself – i.e. in the framework of Eurojust or special programmes like Falcone. However, the EC/EU activities will directly influence only a minority of the judicial community.

5. General quality of judiciary as an element of the rule of law

The judicial reform initiated by the Ministry of Justice in 1999 was focused on the improvement of the general quality of Czech judiciary, an increase in the judicial capacity and improvement of the personnel of the courts. The proposed reform included the civil procedure reform (i.e. strengthening of the XXX principle, changes in the rules of formal delivery of documents or a seven day long limit for preliminary measure in property disputes), establishment of the private executors, amendments of the civil and commercial codes, reform of the criminal procedure (concentration of the investigation performed by the police and investigator, reinforcing the role of public prosecution) and changes in the system of the criminal punishments (new act on probation and mediation service). The norms mentioned are drafted in a way to enable to “link up“ with international agreements and co-operation within the framework of the EU. However, the Czech courts criticise the increase in the judicial agenda and even structural errors in the reform of the civil procedure. Another controversial step of the reform is the privatisation of several former judicial activities (property executioners, notaries) which in the final instance caused an increase in the workload for the courts – non-complicated (and therefore profitable) causes are decided by the private institutions while in the complicated matters the courts have remained the final arbiters.

The amendment of the Judicial Act (zákon o soudech a soudcích) was intended to enhance the continual education of the judges (in particular by the means of mandatory qualification tests and training provided by the Judicial academy). The amended Judicial Act has been declared by the Constitutional Court as incompatible with the principle of independence of judiciary and, therefore, to be void. The structure of Czech judiciary remains in principle the same as the judicial system of the Austrian-Hungarian monarchy in the 19th century.

The financial situation of the judges also belongs to the catalogue of issues influencing the general quality of Czech judiciary. In the last decade, the average salary of the judges increased significantly but the open question remains in the possibility to influence the judges' salaries by the decision of the legislature and the radical gap between the salary of the active judge and his/her pension.

6. Actors – courts, Constitutional Court and the Ministry of Justice

An approach of the individual actors (in particular that of courts, the Constitutional Court and the Ministry of Justice) will be crucial for the success of the judicial reform of the Czech Republic.

Czech judges (of ordinary courts) could perceive the judicial reform as another complication of their work or as a mechanism strengthening their position towards executive and legislative powers, and even towards higher courts (in Czech judicial hierarchy).

The first option – impression that the judicial reform is another burden imposed onto the Czech judiciary from abroad – would be very unwelcome. Czech judges will have to learn to operate with new legal norms and procedural interments anyway. If not, their work will be criticised both by the parties of the disputes (who would be prevented from protection based on the community law) and by general public opinion since the Czech state would have to bear the moral and financial burdens of the judicial incapacity.

However, the accession to the European Union can be perceived by ordinary Czech courts as strengthening their position towards executive and legislative powers and, indirectly, even towards higher courts (in Czech judicial hierarchy). For instance, the preliminary question to the European Court of Justice enables an ordinary court to "by-pass" higher Czech courts and to communicate directly with the ECJ. Properly formulated, the preliminary question puts the respective Czech judge into the "first league" of European legal world, since the answer of the ECJ is usually frequently cited and commented. The practice of the current member states shows that the

preliminary questions are more frequently used by lower courts, even if the higher courts are more familiar with the international aspects of judicial co-operation.

Additionally, the EC law will provide Czech courts with an instrument against the executive and legislative powers. At present, the Czech judge (as a judge in the continental legal tradition) is under obligation to apply legal norms formulated by the legislative power (Parliament). After the accession to the European Union, however, the Czech Courts will be authorised to oppose those Czech norms which are incompatible with the EC/EU law. An analogous process exists already in relation to the non-applicability of unconstitutional laws.

The Czech Constitutional Court could function as the control mechanism for the application of the acquis communautaire in the Czech Republic – by evaluating the compatibility of the Czech domestic norm with the EC/EU law. Such a possibility is further supported by present practice of control of the compatibility of Czech norms with international treaties on human rights. This trend is restricted by two factors: The first one is the restriction of the control to exclusively negative one which means that the Constitutional Court cannot force the legislative and executive branch to active steps. The second restriction is potential (and probable) rivalry between the constitutional court of a member state and the ECJ (the most typical example is the tension between the ECJ and German Constitutional Court).

As result of the rivalry between the ECJ and the Constitutional Court, the latter can put itself into shoes of the ultimate guardian of Czech sovereignty against the “invasion“ of the acquis communautaire. This approach of the Constitutional Court seems to be of rather limited success and is likely to result in the deference of the Czech institution.

The Ministry of Justice belongs to the main initiators of the judicial reform. The communication between the Czech Republic and the European institutions is also channelled predominantly by the European Commission and the Czech Ministry of Justice. The efficiency of commentaries and inspiration from the EU is, however, weakened by certain scepticism of Czech courts towards information communicated

by the Ministry. The initiatives of the Ministry of Justice – focused i.e. on the education in the European law – are a priori considered as another attempt of the executive branch to increase the control over the judiciary.

The description of the judiciary in the media is also worth consideration. The capacity and willingness of the courts to communicate with the public has been rather limited. Hence, the media coverage has focused predominantly on the excesses of the judicial practice.

7. Conclusions and recommendations:

- The membership in the European Union will influence Czech judiciary at three levels (of intensity) – requirements of membership in a narrow, technical sense (capacity of Czech courts to communicate with the European Court of Justice and courts in other EU states, judicial co-operation in I. and III. pillars), general capacity of Czech judiciary to enforce the EC/EU law (knowledge of the EC/EU law among judges, ability of its application in a particular case and the enforcement of the principle of priority of the EC law over national law) and general quality of the judiciary as an element of the rule of law (quality and speediness of judiciary in cases without the ES/EU element, independence of judiciary).
- The inspiration of the European integration on Czech judiciary reform will be limited. The EC/EU law is focused on the judicial capacity of member states to apply the EC/EU law and to filter domestic norm incompatible to the acquis – not on details of the judicial system of a particular member state. Therefore, main sources of inspiration for the judicial reform shall remain documents of the Council of Europe and the practice of (some) member states. Quality of the judiciary is not a formal requirement of EU membership. However, it is the prerequisite of successful membership.
- A kind of tension between the position of the Czech Constitutional Court, which focuses on the independence of Czech judiciary, and the critique by EU institutions, which is targeted on the capacity of Czech courts to apply acquis. The

judicial independence and judicial capacity are not directly interconnected – there can even exist a short term tension between those two principles.

- The necessity of the continuous education of judges in the EC/EU law is further strengthened by the absence of the EC/EU university courses in the educational experience of older judges. The solution can be found in (temporal) preference of the requirement of the knowledge of the EC/EU law over the strict interpretation of the judicial independence – for example, in the form of a mandatory exam in the EC/EU law and/or more consistent application of the disciplinary sanctions against those judges who neglected their education in the EC/EU law.
- Czech judges (of ordinary courts) shall not perceive the judicial reform as another complication of their work. The preferred interpretation is that the "European" judicial reform will strengthen their position towards executive and legislative powers, and even towards higher courts. The enthusiasm of Czech judiciary in the judicial reform would be further enhanced by the unburdening of the courts – i.e. by an increase in the number of judges, better technical equipment and/or the establishment of qualified assistant(s) to each judge.
- Czech Constitutional Court can, after Czech accession to the EC/EU, function as the last guarantor of Czech obligations under acquis before a potential conflict appears on the EC/EU level (typically before the European Court of Justice). In contrast, the Czech Constitutional Court can also appear in position of a „guarantor" of the Czech sovereignty against influence of the European integration – this scenario would lead probably to the conflict with the European Commission and the ECJ.
- There is a risk that Czech companies and individuals will learn to apply the EC/EU law earlier and more effectively than Czech judiciary. The potential to do so has been already expressed in the increasing number of complaints before the European Court for Human Rights.